

**DISCERNING WHETHER WE ARE ABLE TO COMPLETELY DEVOLVE  
SECURITY FUNCTIONS TO COUNTIES IN KENYA AND IF THIS IS A  
PRACTICAL SOLUTION TO THE INSECURITY PROBLEM.**

**Submitted in partial fulfillment of the requirements of the Bachelor of  
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## DECLARATION

I, AREMO EVA AKINYI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

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## **LIST OF ABBREVIATIONS**

CIPEV	Commission of Inquiry into the Post-Election Violence
CID	Criminal Investigation Department
PC	Provincial Commissioner
AP	Administration Police
DCI	Directorate of Criminal Investigations
IG	Inspector General of Police
PRIC	Police Reform and Implementation Committee
NPS	National Police Service
NPSC	National Police Service Commission
SAPS	South African Police Service
OCPD	Officers Commanding the Police Division
OCS	Officers Commanding the Station
NSC	National Security Council
NSAC	National Security Advisory Committee
CPA	County Police Authority
CSC	County Security Committee
RPC	Regional Police Coordinators
NGAO	National Government Administration Office
IPOA	Independent Policing Oversight Authority
NPSA	National Police Service Act

# CHAPTER ONE

## 1.0 BACKGROUND TO THE PROBLEM

The level of security of a country is one of the major factors that will enable or disable it focus on improving its economy.

The incidences of violence and insecurity in the country, and the government's inaction or lack of response<sup>1</sup> has led members of the public to question the central government's ability to effectively perform its primary duty of protecting and providing the constitutional freedoms, which mainly include; the right to life and the right to security of persons.<sup>2</sup>

Issues of crime and insecurity are viewed as major challenges in the country, in both urban and rural areas. Some of the most dreadful of these incidences experienced in the country which have claimed many lives include:

1. The post-election crisis which immersed the country in a crisis in 2008 vividly showed the severe weaknesses of the Kenya Security sector whose image was badly tainted by the actions of some of its members. According to the Commission of Inquiry into the Post-election Violence (CIPEV), the security sector lacked the level of expertise required during the crisis.<sup>3</sup> While some members of the force allowed themselves to be actively used for divisive political purposes<sup>4</sup>, others assisted citizens in distress based

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<sup>1</sup> There has been a breakdown of communication and cooperation between the senior national security officers and the county commissioners, appointed by the President, especially in sharing local intelligence information. This poor relations between the organs is detrimental to the security of the country as witnessed by the rampant insecurity: International Crisis Group Africa Briefing, '*Kenya's Somali North East: Devolution and Security*', November 2015, 5-6.

<sup>2</sup> Kenya National Commission on Human Rights, '*The Error of Fighting Terror with Terror*', September 2015: UNDP, '*Are We Under Siege? The State of Security in Kenya*', 2014; Article 26 and 29, *Constitution of Kenya*, 2010.

<sup>3</sup> '*Kriegler and Waki Reports*', Revised Edition, 2009, 54.

<sup>4</sup> 'The administrative authorities: the police, the security forces & the provincial administration take responsibility for various omissions and commissions such as failing to act with discipline and impartiality and sometimes committing acts of serious crimes against civilians.' Kriegler and Waki Reports, 54.

on their political affiliations and ethnic identity.<sup>5</sup> Also, others were involved in criminal acts and committed murder, rape, arson, theft and all sorts of other crimes.<sup>6</sup>

2. The Westgate Mall Attack. On September 21, 2013, gunmen, who were suspected to be members of the Somali militant group, Al-Shabaab, attacked the Westgate Mall in Nairobi. After a four-day standstill, Kenyan officials asserted that the site of the attack was secured by armed forces. The attack resulted in hundreds of casualties and deaths.<sup>7</sup> The response of the government was viewed as poor. There was a Commission of Inquiry report which outlined some of the security gaps<sup>8</sup> experienced during the attack. There was also a poor security force response that saw officers from different agencies shooting at each other during the terrorist attack.<sup>9</sup>
3. The Garissa University Attack.<sup>10</sup> In 2014, gunmen raided the Garissa University and injured and killed more than one hundred people within the institution. Al-Shabaab later claimed responsibility for the attack and claimed that it was in response to the deployment of Kenyan troops in Somalia.<sup>11</sup> The government has admitted that there were gaps in the security response during the attack.<sup>12</sup>
4. The Turkana – East Pokot Border Attack, that happened in 2015 where at least 46 people were killed after those believed to be outlaws attacked and stole unknown sums

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<sup>5</sup> ‘The administrative authorities take responsibility in regard to the violence for failure to respond adequately and appropriately to the violence, thereby aggravating the suffering of the victims.’ Krieglner and Waki Reports, 54.

<sup>6</sup> International Centre for Transitional Justice, ‘*Security Sector Reform and Transitional Justice in Kenya*’, 2010, 3.

<sup>7</sup> ‘*National Consortium for the Study of Terrorism and Responses to Terrorism*’, START Background Report, 2013, 1.

<sup>8</sup> Corrupt Kenyan police and border guards assisted terrorists to access the country from Somalia; Kenyan authorities received intelligence which pointed to the fact that there was an impending attack on one of the malls in Nairobi, at least twice, in the months leading up to September 2013 – Report of the Joint Committee on Administration and National Security; and Defence and Foreign Relations on the Inquiry into the Westgate Terrorist Attack and Other Terror Attacks in Mandera in North Eastern and Kilifi in the Coastal Region, 2013, 7.

<sup>9</sup> Human Rights Watch, ‘*World Report 2015: Events of 2014*’, 2015, 334.

<sup>10</sup> Kenya National Commission on Human Rights, ‘*The Error of Fighting Terror with Terror*’, 2015; Security Research and Information Centre, Kenya, 2015.

<sup>11</sup> Bellal A, ‘*The War Report: Armed Conflict in 2014*’, 2015, 236 – 237.

<sup>12</sup> There was lack of action by security agencies and the university management to act on the prior warning of the attack; the late deployment of an aircraft to support the rescue team (Recce Squad).

of cattle. Currently, no official reports have been made on the attack. However, in a media report, the Baringo County Commissioner, Mr. Okwanyo, stated that there needs to be a security team in Turkana East to deal with this issue of banditry because of the tension. Also, one of the reasons why there may be poor response by government security bodies is because of the remoteness of the area,<sup>13</sup> which leads those living around that area to believe that the area may need a local security body to guarantee their safety.

This dissertation explores whether complete devolution of security functions is possible and if it is one of the practical ways in which the problem of insecurity can be dealt with.

Devolution in the Constitution of Kenya is presented as ‘a system of multilevel government under which two distinct and interdependent levels of government – the national and county – are required to conduct their mutual relations in a consultative and cooperative manner.’<sup>14</sup> The objects of devolution set out in Article 174 of the Constitution of Kenya can be broadly grouped into: those that promote and advance democracy and accountability; development and service delivery; equity and inclusiveness and those limiting centralisation.<sup>15</sup>

Devolution of security functions refers to a system whereby the national government in a country transfers the internal security responsibility, for specified functions, to organs that are largely outside the direct control of the central government.<sup>16</sup> The Constitution under the Fourth Schedule, which deals with the division of functions between the national and county governments, specifies security functions as exclusive to the national government, with most of the mandates placed under the Inspector General of Police.<sup>17</sup> The security services include: the national defence and the use of national defence services, police services, including the setting of standards of recruitment, training of police and use of

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<sup>13</sup> Human Rights Watch, *There Is No Time Left*, Climate Change, Environmental Threats, and Human Rights in Turkana County, Kenya, 2015.

<sup>14</sup> Kangu J, *Constitutional Law of Kenya on Devolution*, Strathmore University Press, Nairobi, 2015, 10.

<sup>15</sup> Article 174, *Constitution of Kenya* (2010); Kangu J, *Constitutional Law of Kenya on Devolution*, 111.

<sup>16</sup> Crook R & Manor J, *Democracy and Decentralization in South Asia and West Africa*, Cambridge University Press, Cambridge, 1998, 81; Reynolds A, *The Architecture of Democracy – Constitutional Design, Conflict Management and Democracy*, Oxford University Press, United States, 2002, 209.

<sup>17</sup> Constitution of Kenya, 2010, Article 245.

police services, criminal law and correctional services. However, not all of these security functions mentioned above are under the mandate of the Inspector General of Police.

## **1.1 STATEMENT OF PROBLEM**

Determining whether it is practical to devolve some specified security functions to counties, and if this move will deal with the problem of insecurity in Kenya with such that the government will be performing its primary function of protecting the Kenyan citizens.

## **1.2 JUSTIFICATION OF THE STUDY**

Security is a function of the national government but because of its dominated discussion since the introduction of devolution, after the inauguration of the 2010 Constitution, it cannot be ignored. The overriding argument is that, although it is a function of the national government, can some functions of internal security be devolved to the counties?

The cases of insecurity discussed above and others which have not been mentioned, in the country, raise important questions about the structure of the country's security sector. The continued failure by the national government to contain some of these challenges supports the argument to have county governments involved in dealing with them. These cases have created a negative perception of incompetence and corruption on the part of the national government.

Before the 2010 Constitution, Provincial Administration – running from the Office of the President to the Sub-Chief – was the frame of the Kenyan state. This changed with the 2010 Constitution. However, the problem, it may seem, is that those framing the laws may not have come up with what can be called good alternatives because the security situation has deteriorated. When it comes to security, it is important that there be supervision of law enforcement agencies and that it goes through a democratic test.<sup>18</sup>

Is it therefore possible and wise to devolve specified security functions in Kenya as one of the ways to deal with the problem of insecurity?

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<sup>18</sup> 'Devolution is often seen as desirable for its economic efficiency, equity & responsiveness because the centres of decision making are closer to the people and are more representative of local needs.'

### **1.3 RESEARCH OBJECTIVE**

This research aims to question whether the menace of insecurity in the country can be reduced or completely done away with through devolution of some internal security functions, such that they are dealt with by county governments.

### **1.4 QUESTIONS FOR RESEARCH**

The following are the research questions:

- 1) Due to the problem of insecurity in the country, is complete devolution of security functions, such that county governments can be engaged in the administration of security, one of the practical ways that can be employed to try and solve the problem?
- 2) By considering arguments put forth against devolution of security functions, how prudent will it be to facilitate the inclusion of the county governments in the management of security?
- 3) If complete devolution of security functions is unattainable, are there any other existing mechanisms through which county governments can be engaged in administration of security?

### **1.5 METHODOLOGY**

This study will use a qualitative approach to look at the Constitutional provisions which have expressly delineated functions between the national and county governments and look at whether there is a mechanism for the transfer of functions between both levels of government, that is, the national and county governments.

Furthermore, the study will look at the desk research of secondary information such as annual security reports made by other governments, whose security functions are devolved, so as to look at the state of insecurity in those countries. The study will also look at the works and assertions made by various scholars in the field.

These methods will help frame and put into context the situation at hand and as such will help provide a ground to search for answers.

## 1.6 DEVOLUTION – LITERATURE REVIEW

The original concept of devolution was put forward by Edmund Burke, in the 18<sup>th</sup> century. He used the idea of devolution to offer a solution to the challenges faced by the British government by the American colonialists and the Irish Catholics who were excluded by the 1801 Act of Union.<sup>19</sup> He based his argument on the fact that, the Westminster Parliament had two major functions – to act as the legislature for the United Kingdom and to be the imperial power for all British colonies. Therefore, these two functions were separated such that the British colonies could have their own local legislatures while at the same time, still owe allegiance to the imperial power in London.<sup>20</sup>

Aughey A., states that the central idea behind devolution is to find a central ground between separation of powers on one hand and over-centralisation of resources and power under the government on the other.<sup>21</sup> This central idea discussed is what can be said to have been used to come up with the working definition of devolution which means, ‘the transfer of powers from a superior to an inferior political authority’.<sup>22</sup>

Bogdanor, identifies three major forms of devolution, as found in other jurisdictions. The Welsh, practises executive devolution. This means that the power to make decisions is devolved. The Scottish Parliament practises legislative devolution. This means that the power to make laws is devolved. Another form of devolution is administrative devolution. This means that the power to carry out specific functions is what is devolved. This form of devolution was practised by the Welsh, Scottish and Northern Ireland areas.<sup>23</sup> At the moment, it may seem that Kenya practises the administrative form of devolution in the security sector. This is because, the power to enact laws dealing with security matters has still been left to the national government while other bodies, within the sector, carry out their legal mandated functions.

Mutakha Kangu states that the Kenyan Constitution presents devolution as a system of multi-level government under which the Constitution creates two distinct and interdependent levels of government – the national and county – that are required to conduct

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<sup>19</sup> Pilkington C, ‘*Devolution in Britain Today*’, 2002, 9.

<sup>20</sup> Pilkington C, ‘*Devolution in Britain Today*’, 9-10.

<sup>21</sup> Aughey A, ‘*Nationalism, Devolution & the Challenge to the United Kingdom State*’, 2009, 11.

<sup>22</sup> Pilkington C, ‘*Devolution in Britain Today*’, 8.

<sup>23</sup> Chance C, ‘*Constitutional Reform in the United Kingdom*’, 1998, 280.

their mutual relations in a consultative and cooperative manner.<sup>24</sup> The central ideas behind devolution as set out in Article 174 of the Constitution can be broadly grouped into: those promoting and advancing democracy and accountability; development and service delivery; equity and inclusiveness; and those limiting centralisation.<sup>25</sup>

The upholder of national security in a devolved government is also something that needs to be addressed. In the UK, for example, since there is devolution from higher level governments to local bodies, especially, local urban bodies, the local governments are the ones recognized as the immediate custodians of citizen's welfare.<sup>26</sup> However, with the current phrasing of the Constitution<sup>27</sup>, it may be impossible to leave this function primarily on the local governments. This means that the Constitution may have to be amended so as to actually state who the custodian of national security will be if devolution is considered.

Another area of focus would be to look at the rationale for having policing functions under either the central government or the county or provincial government. Kornicki states that, historically, the idea behind having police control under the central government was because of the fact that there was widespread anti-government activism. This rationale was developed during the colonial era. Rather than to merely serve the residents, the police were also expected to protect territories from invasion from colonial powers. In keeping in line with this view, police functions in all major European capitals, for example Paris, were under the jurisdiction of the central government.<sup>28</sup>

According to the Central Bureau of Investigation, separate policing organisations were set up because the organ established by the state was unable to efficiently carry out its functions. At an early stage of the World War II, the government of India was experiencing large scale corruption even with policing functions under the central government. Since the police and other law enforcement agencies set up by the state were unable to combat the prevailing corruption, a separate organisation was set up to deal with the problem.

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<sup>24</sup> Kangu J, '*Constitutional Law of Kenya on Devolution*', Strathmore University Press, Nairobi, 2015, 10.

<sup>25</sup> Kangu, '*Constitutional Law of Kenya on Devolution*', 111.

<sup>26</sup> A Nirmaj, '*Formation of a Grants Policy for Local Bodies*', 1981, 12.

<sup>27</sup> Fourth Schedule, *Constitution of Kenya*, 2010 which clearly states national security shall be a function of the national government.

<sup>28</sup> Kornicki P, 'Meiji Japan: The Emergence of the Meiji State', 1998, 113; Murray T & Beare M, 'Police and Government Relations: Who's Calling the Shots?' 2006, Chapter 2 and 5.

Therefore, the setting up of a separate body to deal with corruption was seen as an urgent necessity.<sup>29</sup>

Therefore, with this foundation in mind, where do we go from here? The research will seek to answer whether the current legislation we have on devolution is sufficient enough such that we are also able to include devolution of security functions. However, with the background that there are various forms of devolution, it may be necessary to consider having complete versus partial devolution – having in mind the sensitive nature of the security sector.

## 1.7 THEORETICAL FRAMEWORK

Devolution of political power, responsibilities and resources is originally believed to have arisen from social facts. Due to this, the social contract theory is one that describes the relationship in society between laws and people, and why the members of the general public need them for existence.<sup>30</sup>

Thomas Hobbes (1588-1689) proposed that, a society not governed by rules and laws would be an unruly one and full of tragic events. He explains that, it would be a Darwinian situation such that only the strong would be able to survive and the weak would perish because of the inability to provide for themselves. Hobbes believed that such a society would turn out to be a “dog-eat-dog” place because people would do whatever it took just so that they can survive, at the same time, ensuring that they are not attacked for another man’s survival.<sup>31</sup>

For Hobbes, therefore, the solution to this problem was to have a social contract between the government and the members of the society. The social contract meant that, everyone in society came into some sort of cooperative understanding, which is what is considered to be the ‘social contract’. In that way, everyone’s interest would be to enforce rules that provide safety and security for all even the weakest. The social contract, once enforced, would be able to transform a society from a “state of nature” into one that would flourish. The degree to which the social contract and provision of security would protect

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<sup>29</sup> Central Bureau of Investigations, ‘Central Police Organisations’, 2005, 223.

<sup>30</sup> McCartney S & Parent R, ‘*Ethics in Law Enforcement*’, Victoria BC Campus, 2015, Chapter 2.

<sup>31</sup> Castells M, ‘*Materials for an Explanatory Theory of the Network of Society*’, University of California, 1999, 9.

the weak would depend on various other factors, but it would be agreed upon all that there is a need to contract so as to ensure security for all.<sup>32</sup>

Other major proponents of the theory include Jean Jacques Rousseau and John Locke. Both of them talk about the state, government and individuals. Locke and Rousseau state that there is a social contract between the government and the state such that the state exists to preserve and protect the natural rights of citizens. The two proponents believe that when the government fails in its primary role of protecting citizens, then the individuals in the state have a right and sometimes this right can even be considered an obligation, to rebel against the state.<sup>33</sup>

In most societies, there is what can be called a ‘social contract’ between citizens and the government. One of the main functions of any government in any jurisdiction is to protect the civil liberties of citizens. Some fundamental natural rights are: the right to life, liberty and property.<sup>34</sup> Protection of these fundamental rights relates to the issue of insecurity. The citizens expect the state to, keep them safe and secure.<sup>35</sup> However, there are many citizen grievances in the current Kenyan situation, as indicated above, stating that the government has at times, failed to act, while in some instances, it has, but the actions it takes are unsatisfactory. Therefore, it may seem that it is the duty and also the right of citizens to demand that actions be taken against the state so that rules can be enforced to protect the weak, in this case, the citizens in general, to prevent them from perishing due to insecurity in the country. Rousseau and Locke both propose that the individuals in a state have a right to rebel when the government breaches the social contract. Thus, by testing devolution of security functions in the country, this research may be seen as one of the options that citizens may have as a means of improving the state of security in the country.

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<sup>32</sup> Elahi M, ‘*Social Contract Theory by Hobbes, Locke & Rousseau*’, Academia, 2016, 4.

<sup>33</sup> Elahi M, ‘*Social Contract Theory by Hobbes, Locke & Rousseau*’, 5; Cassesse M & Vohrah L C, ‘*Man’s Inhumanity to Man*’, 2003, 184-185.

<sup>34</sup> Constitution Society, ‘*The Social Contract and Constitutional Republics*’, 2007.

<sup>35</sup> Fagan H. G & Munck R, ‘*Globalization and Security: Social and Cultural Aspects*’, 2009, 52.

## **1.8 LIMITATIONS**

### **1) Limited Access to Information:**

Since the study will rely mainly on secondary information, some of these resources may be unavailable or difficult to access.

### **2) Limited Time:**

The research is to be covered and submitted within a certain time limit as it is part of the course work of the Bachelor of Laws degree.

### **3) Costs of Research Resources:**

Other than some resources being unavailable, some may be available but costly to acquire. For example, the cost of buying books which are only available on hard copy.

## **1.9 CONCLUSION**

The research will therefore try to look at whether devolution of security functions in Kenya is attainable and efficient with consideration to the current situation in the country and whether it is one of the ways in which the insecurity problem can be addressed.

## CHAPTER TWO

### 2.0 THE GOVERNANCE LEVELS AND INSTITUTIONS IN THE POLICE FORCE

#### 2.1 HISTORICAL OVERVIEW

In assessing the possibility and advantage of devolving security as a solution to insecurity, this chapter will focus on the previous governance levels and institutions in the police force and look at the current Kenyan situation. Chapter 3 of this dissertation will then give a broader discussion on the sufficiency of devolution in further detail.

In East Africa, the police force organ officially began in the year 1896, a year after Kenya was declared a Protectorate. The British Foreign Office declared that the first police station in Kenya be opened in the city of Mombasa. During this period, the term that was commonly used to refer to soldiers was “Askari”, which is currently still the term used to refer to them. The soldiers were troops from East Africa and the Middle East who served in the European armies. The first policemen to be recruited were used to safeguard shops, storehouses and banks – most of which was European property. The era of the colonial rule saw indigenous people being recruited by various colonial powers as soldiers. Some of these colonial powers included, the Italian, British, Portuguese, Belgian and German. These soldiers participated in assisting the European forces to acquire the colonial territories which were finally put under their rule and they later functioned as the major defence force within the territory. Also, they participated in the 1<sup>st</sup> and 2<sup>nd</sup> World Wars.<sup>36</sup>

The British Imperial Company had an administration bloc which protected various interests such as trading routes, business centres, staff etc. Also, it appealed to other bloc's such as the East African Rifles, the Uganda Rifles and the King's African Rifles for help in protection of trade ventures.<sup>37</sup>

In 1920, the modern Kenya Police was founded. However, Africans only occupied subordinate positions ranks and worked under the Europeans and Asians. In the urban areas, especially Nairobi, the police force was expected to maintain safety. This means, they were to prevent any potential crime from occurring and suppress any disorder which would arise from the

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<sup>36</sup> Sommer H M, *'History of the Police in Kenya 1885-1960'*, 2007, 2.

<sup>37</sup> Sommer, *'History of the Police in Kenya 1885-1960'*, 4.

Africans who were then living in “Eastlands”.<sup>38</sup> During this year also, there was a review carried out within the organ and the Criminal Investigation Department (CID) was established. Also education classes were provided for those officers who served in the lower ranks – these included mainly the African soldiers.<sup>39</sup>

The police force was later expanded because of propositions in the report made by the Police Terms of Service Committee of 1946 which recommended that the force be expanded. Also, at this time the territory experienced many rebellions against the British, therefore, the imperial power felt the need to have more people serving in the force so as to contain the unrest from the Africans. Still, even with the expansion of the force and extension of skills to those in the subordinate ranks within the body, this did not have any effect on what was considered to be the main function of the force – that is, that it was to be an instrument of the colonial administration to suppress the Africans.<sup>40</sup>

Between 1952 and 1960, the imperial power was in fear due to the increase of the rebellious groups with the most famous being the Mau Mau in the late 1940’s and begin of the 1950’s. The main areas of the group’s operation were the Rift Valley and Central areas of Kenya. Due to this, in October 1952 a state of emergency was declared. The army took power over from the police, which as seen from above, was at a lower level, in terms of enforcement agencies at the time. Various security forces worked during this period when the state of emergency was declared – some of which include: the Home Guards, the British military, volunteer military forces and the Kenya police force. A special police bureau, the ‘Special Effort Force’ was set up in 1953 mainly to deal with the Mau Mau movement. The Kenya Police Reserve and the CID were the most active departments in trying to suppress this rebellion. Also, the number of those serving in the police force rose. In 1954 the Police force consisted of about 14,000 policemen, in addition to the increase in manpower, about 200 Police Signals stations were set up, more British trained policemen were engaged, the vehicles were equipped with wireless communication to improve communication and several District Military Intelligence Officers were employed countrywide. The state of emergency ended in 1960. This Mau Mau revolt and the fear of any other rebellions was what made the British power to leave the colony in 1963

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<sup>38</sup> Ruteere & Pommerolle, *‘Democratizing Security or Decentralizing Repression? The Ambiguities of Community Policing in Kenya’*, African Affairs Vol. 102, 2003, 587.

<sup>39</sup> Mulei, *‘Theories on the Role and Function of the Police’*, University of Nairobi, 2008, 17.

<sup>40</sup> Foran, *‘Kenya Police 1887’*, Robert Hale Ltd, London, 1960.

and hand over the country to those African politicians who had been leading the country in the struggle for independence. This led to the acquisition of independence of Kenya that same year.<sup>41</sup>

Following the independence of Kenya, the Constitution used at that time was based on the Westminster model. The various provisions in the Constitution envisioned the police force as a completely neutral and independent body. Also, the 1963 Constitution provided that the police force would be established by law and that the force would be regulated by a Police Service Commission and National Security Council. The Inspector General Police was to be appointed by the President on the guidance of the Police Service Commission. However, these provisions were never realized due to the lack of legal structures which would necessitate this change.<sup>42</sup>

During the early 1990s, the uncertainty felt in the country due to the move towards a multi-party democracy brought greater pressure for police reform in the country. There was a rising need to transform the police into a more modern service, with standards in line with international ideals of policing.<sup>43</sup> This however, was not realized until 2002 after there was a change of government, with the National Coalition for Reforms and Democracy (NARC) winning the elections. In 2003, the then government established the Task Force on Police Reforms, which was the first time such a far-reaching reform procedure specifically targeting the police had been started by the government. The task force was required to analyse the current policing activities in place and provide recommendations. The task force proposed a number of commendations including, but not limited to, encouraging the development of a public relations campaign and the employment of structural changes and institutional reorganization. The focus of the task force was, however, not on accountability and professionalism.<sup>44</sup>

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<sup>41</sup> Commonwealth Human Rights Initiative & the Kenya Human Rights Commission, *'The Police, The People, The Politics: Police Accountability in Kenya'* 2006, 4-5; Sommer, *'History of the Police in Kenya 1885-1960'*, 13-14.

<sup>42</sup> Ghai Y, Constitution of Kenya Review Commission, *'The Constitution and the Economy'*, Institute of Economic Affairs, 2002, 62.

<sup>43</sup> The report made by the Constitution of Kenya Review Commission established that the public perceived the behaviour of the police as corrupt and violent which was not in line with the United Nations standards of policing.

<sup>44</sup> Commonwealth Human Rights Initiative & the Kenya Human Rights Commission, *'The Police, The People, The Politics: Police Accountability in Kenya'*, 7-8.

The structure above outlines what was the National organization.

On a provincial level, there was a Provincial Commissioner (PC) in charge of each of the 10 Provinces. Under the PC was a unit command known as the Administration Police. Each province had its own body. After independence this system was retained by the new government. The reason was that it was a system which provided a link between the government and the people who were considered to be in the lower local level.<sup>45</sup>

## **2.2 CURRENT STRUCTURE**

Currently, the Inspector General of Police is Joseph Kipchirchir Boinett. He is in charge of all policing and security functions in Kenya. This office was introduced so as to replace the office of the Police Commissioner. He is the second holder of the office after David Mwole Kimaiyo.

The Kenya Police is divided into the following bodies:<sup>46</sup>

1. The General Service Unit
2. The Anti-Stock Theft Unit
3. The Criminal Investigation Department
4. The Traffic Police Department
5. Kenya Police College
6. Kenya Police Air Wing
7. Kenya Railways Police
8. Tourism Police Unit
9. Kenya Police Dog Unit
10. Kenya Airports Police Unit
11. Diplomatic Police Unit
12. Maritime Police Unit
13. National Disaster Management Unit
14. Presidential Escort Unit

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<sup>45</sup> Nguru S, *Provincial Administration under the New Constitution*, 2012, accessed at:

<http://www.ustawi.info.ke/index.php/government/government-under-the-new-constitution/provincial-administration>.

<sup>46</sup> Kenya Police Service. Retrieved from:

[http://www.kenyapolice.go.ke/index.php?option=com\\_content&view=article&id=67](http://www.kenyapolice.go.ke/index.php?option=com_content&view=article&id=67).

The Police Act lays down the main functions of the police service as: maintenance of law and order; preservation of peace; protection of life and property; prevention and detection of crime; apprehension of offenders; and enforcement of all laws and regulations with which it has been charged.<sup>47</sup>

Other than the Police Act, the police force is also guided by the National Police Service Standing Orders. These were put in place to guide the actions of the members of the force and ensure that they always observe the law when carrying out their functions. The Orders establish the formation of various units of the service, which have been mentioned above, and their range of work. Also, it stipulates the functions carried out by the Administration Police (AP) and Criminal Investigation Department (CID). The Standing Orders also show the national police organisational structure, working units and operational ones with clear guidelines on how officers should handle various situations. The Standing Orders are executive orders for the general control, direction and information of the service so as to unite police services under the command of the Inspector General (IG) of Police. It states that executive duties of those in the service shall be exercised at the instruction from the office of the Inspector General and delegated accordingly to the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations (DCI). Deputy Inspectors General will be in charge of AP and regular police services and the DCI. It also presents a framework of all the new police positions and their functions, police stations and outposts and what is supposed to be done in those places.<sup>48</sup>

### **2.3 POLICE REFORMS**

The outcome of the 2007 post-election violence was one of the main factors that led to the push for the national police reform agenda. The Commission of Inquiry into the Post-Election Violence (CIPEV) linked the police to some of the heinous acts of violence and the killings that were experienced during the Post-Election Violence, as earlier mentioned in chapter one. The CIPEV and the UN special rapporteur report on extra judicial killings both made recommendations that the police force should go through far-reaching changes<sup>49</sup> so as to

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<sup>47</sup> The Police Act, Cap 84 of 2010, Section 14.

<sup>48</sup> *Constitution of Kenya*, Article 243, 244 & 245, 2010; *National Police Service Act*, Cap 84 of 2011.

<sup>49</sup> The Administration Police which was politicized be reformed into a more independent Kenya Police Force; That there be the introduction of an expert, independent body which would be called the ‘Police Reform Group’, that would be expected to report to the then Minister of Justice, and had a six-month mandate to oversee the whole reform process; The introduction of a permanent political body which would oversee the work carried out

improve the general policing system in the country.<sup>50</sup> Also, one of the agendum of the National Accord and Reconciliation Agenda listed was, ‘constitutional, legal and institutional’ reforms, one of which was law enforcement institutions, as a means to improve the protection of the rule of law while the members of the police force carry out their duties.<sup>51</sup> In response to these recommendations, the National Taskforce on Police Reforms in 2009 headed by Retired Judge Philip Ransley was setup by the government. The taskforce came up with up to 200 recommendations. To fast track and coordinate the implementation of the recommendations, the President established the Police Reform and Implementation Committee (PRIC).<sup>52</sup>

Following the recommendations made in the Ransley report various recommendations were then implemented as provisions of law in the formulation of the 2010 Constitution. The promulgation of the 2010 Constitution introduced important changes in the policy, legislation and institutional structures towards police reform and significantly enhanced police accountability. Some key changes included: the establishment of the National Police Service (NPS), that combined the Kenya Police and the Administration Police under one command which was the newly created office of the Inspector General, that was previously held by the Police Commissioner; the National Police Service Commission (NPSC) whose duties are to develop training policies, advise on salaries and remuneration of the members of the Service, supervise recruitment and disciplinary issues and the selection of the members of the National Police Service, : and the introduction of a specific body required to address complaints brought against the NPS.<sup>53</sup>

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by the police (“Police Service Commission”) and at the same time, function as an investigative/disciplinary body (“Independent Police Conduct Authority”), p. 478 *Commission of Inquiry into Post-Election Violence*.

<sup>50</sup> International Centre for Transitional Justice, ‘*The Kenyan Commission of Inquiry into Post-Election Violence*’, 2008, 1-2; Alston P, United Nations General Assembly, ‘*Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*’, 2010, 88-101.

<sup>51</sup> African Union, Government of Kenya, ‘*The Kenya National Dialogue and Reconciliation*’, 2011, Agenda Item IV.

<sup>52</sup> Hon, Mr. Justice (Rtd) Philip Ransley, Report of the National Task Force on Police Reforms, 2009.

<sup>53</sup> *Constitution of Kenya*, Article 243-247, 2010.

## **2.4 CONCLUSION**

In conclusion therefore, this chapter's main focus was to give the history of development of the Kenyan police force until its current status. How centralization of security and policing functions has currently failed together with the disadvantages and advantages of having a devolved system of security are discussed further in Chapter 3.

## CHAPTER THREE

### 3.0 THE SUFFICIENCY OF DEVOLVING SECURITY FUNCTIONS

After looking at the history of the police sector, this Chapter seeks to test the sufficiency of devolving security functions – and if this is a feasible solution in light of other considerations. In as much as the general police force may have failed to efficiently carry out its required duties, is complete devolution practical?

As mentioned earlier in Chapter 1 of this paper, the social contract theory is the theoretical principle that describes the relationship in society between laws and people, and why the general public needs them for peaceful existence. Hobbes, who is regarded as the main proponent of this theory states that, a society without rules and laws to govern our actions would be an undesirable place to exist in. He describes a society without rules as one living in a “state of nature.” In such a state, people would act with lack of concern to others. Life in a state of nature would be Darwinian, where the strongest survive and the weak perish. Such a society described by Hobbes, refers to one without the luxuries and requirements that are taken for granted in today’s society.<sup>54</sup>

The solution to this problem according to Hobbes, is for those living in a society to come together and have a social contract which can protect everyone, especially those regarded as the weakest in society. Therefore, the government is expected to come up with standards or regulations which will ensure provision of security for all. At the same time, the people are expected to obey them. The duty of respect of citizens towards the state relies on the capability of the state to provide security to all.<sup>55</sup>

According to Locke and Rousseau, the social contract mainly depends on the state’s important function of ensuring security and safety of the people. If the state is unable to fulfil this function then the people have the power to change those who have legislative power within a state.<sup>56</sup>

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<sup>54</sup> McCartney S & Parent R, *Ethics in Law Enforcement: Social Contract Theory*, Chapter 2, 2012 at - <https://opentextbc.ca/ethicsinlawenforcement/chapter/2-9-social-contract-theory/>.

<sup>55</sup> Atack I, *Nonviolence in Political Theory*, Edinburgh University Press, 2012, 49-51.

<sup>56</sup> Locke says that: ‘Any government that transgresses the law of the people can be opposed because it has violated the limits of its authority. The ultimate right of the people to resist and change a government that exceeds its authority is the best fence against rebellion.’

The proponents are therefore stating that the actions of opposition from the people, is a measure of protecting the uprightness of the state and the rule of law.

### 3.1 RATIONALE BEHIND CENTRALIZATION OF SECURITY FUNCTIONS

Centralization means that, powers are in the hands of one governing body in all parts of a state. This means that only one figure has authority within the state to carry out all functions by itself. Centralization of functions limits all administrative functions to those chosen as representatives of the central government without including other bodies.<sup>57</sup>

In most jurisdictions, security functions are more likely to be centralized because, as seen earlier from the proponents of the social contract theory, the state is the one charged with the primary responsibility to ensure that law and order is upheld so that peace and security is guaranteed for all as the right to life and to security are considered as priceless rights of an individual under the Constitution.<sup>58</sup> The state will carry out this function by having laws which commend punishment in instances where one violates these rights. The aim of this system is to act as measure of prevention of insecurity.

At the same time, these functions assigned to the state should be achievable by them. The government should be equipped so as to effectively discharge these security functions. If the state lacks the ability and means to perform these functions then it is failing to carry out its main function and there is therefore no point in allocation it this responsibility.<sup>59</sup> The general principle is that ‘resources must follow and match responsibilities’.<sup>60</sup>

With the evidence presented in Chapter 1 of this paper, showing that the national security organs have been unable to control this problem of insecurity,<sup>61</sup> it shows that the central government lacks the capacity, and possibly the machinery, to effectively deal with insecurity

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<sup>57</sup> Conceptual Framework, *Local Government*, 4 at -

[http://www.globalcommunities.org/publications/yslc\\_conceptual\\_framework.pdf](http://www.globalcommunities.org/publications/yslc_conceptual_framework.pdf).

<sup>58</sup> Article 26 & 29, the 2010 Kenya Constitution.

<sup>59</sup> Kangu J, *Constitutional Law of Kenya on Devolution*, 2015, 235; Ghai Y.P & Ghai J.C, *Kenya's Constitution: An Instrument for Change*, 2011, 122.

<sup>60</sup> The Constitution of Kenya Review Commission, *Special Working Document for the National Constitutional Conference: Report on Devolution of Powers*, 2003, 100-101.

<sup>61</sup> The Kenya Police Service, *Annual Crime Report: Crime Analysis – Increases in crime were noted in Criminal Damage 105 cases or 3%, Other offences against persons 567 cases or 3%*.

in the country. This lack of capacity by the central government leads the argument which necessitates having some functions devolved so as to counter these heinous effects.

### **3.2 FAILURE OF SECURITY ORGANS**

Article 10<sup>62</sup> binds all bodies of the State and citizens to observe and respect the rule of law and Constitutionalism. This legal provision requires all state organs and state officials to apply the national values and principles when enacting laws and implementing decisions which would affect the public. This Article fits into the argument below as it shows the link between the decisions made by the police organs and whether the mandate was exercised with respect to the national values and principles. For example, delayed action of the security organs in various instances already outlined above in other Chapters shows lack of good governance in the security organs. Good governance is one of the national values and principles outlined in Article 10 of the Constitution.

The Constitution expressly provides, under the Fourth Schedule, that security functions are an exclusive function of the national government, with the Inspector General of Police charged with the mandate of being incharge of some of them. The security services include: the national defence and the use of national defence services, police services, including the setting of standards of recruitment, training of police and use of police services, criminal law and correctional services. These bodies<sup>63</sup> are to ensure that citizens are protected against any internal and external security threats. The exercise of this mandate by these bodies, which is important, will be regarded as ensuring that there is respect of human rights, human dignity and the rule of law. The previous failure of the security agencies to exercise this obligation has led to the security threats facing the country. They include terrorism, organized crime, ethnic violence, resource conflicts, and robbery with violence and street muggings.<sup>64</sup> Some of these examples, like the Westgate Attack, have been exhaustively mentioned in the first chapter of this paper.

The security gap - failure of the national security organs to battle crime and insecurity is considered as one of the main factors encouraging the rise of illegal gangs. The National Crime

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<sup>62</sup> The 2010 Kenya Constitution.

<sup>63</sup> Article 238, 239 of the Constitution, the security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.

<sup>64</sup> US Department of State's Bureau of Diplomatic Security Kenya, *Crime and Safety Report*, 2014.

Research centre in its report recognized 46 illegal criminal gangs operating within the country.<sup>65</sup>

### 3.3 EFFICIENCIES OF DEVOLUTION

Devolution of security functions may lead to national cohesion and integration. Security organs in their response to insecurity cases, for example, terrorism, have sidelined certain communities. Such actions from these bodies have led to instances of ethnic tensions. In some cases, members coming from these excluded communities have been ejected or reprisals were directed to them. Such actions do not support the spirit of national unity. Vision 2030 clearly demonstrates the interdependence and interconnectivity of the three pillars (economic, social and political). However, implementation of certain policies in addressing the insecurity events are mostly exclusive and discriminatory in nature.<sup>66</sup> Such actions lead to the feelings of hostility.<sup>67</sup>

Another advantage is that it may help to control the gangs and militias whose activities cause insecurity in the country. Youth unemployment is what influences most gang members to engage in crime and gang activities. Youth unemployment was listed as one of the causes leading to increased radicalization in Garissa and Mombasa counties.<sup>68</sup> Radical and extremist groups recruiting the youth into religious and political movements, which can be considered illegal gangs, is the main insecurity issue in the country. The national government and county governments can therefore work together to deal with this problem by encouraging the idle youth to be involved in community policing. A community policing initiative refers to a community-state partnership system in security such that most members of the youth are involved in the combating of security so as to reduce the crime rates. The authorities in a county are likely to have more local knowledge on what is working and they also enjoy greater local

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<sup>65</sup> In 2012 more extra judicial killings were reported and documented by the Human Rights Watch. Between 2013 and 2014, 10 cases of extra judicial killings perpetrated by the Anti-Terrorist police unit have been documented - Human Rights Watch, Kenya, *Killings & Disappearances by Anti-Terror Police Unit*, 2014.

<sup>66</sup> For example, faster responses to incidences of insecurity are noted in regions such as Mombasa and Nairobi than in other counties – Mkutu K, Marani M & Ruteere M, Centre for Human Rights and Policy Studies, *Securing the Counties: Options for Security after Devolution in Kenya*, 2014, 23.

<sup>67</sup> Centre for Human Rights and Policy Studies, *Securing the Counties: Options for Security after Devolution in Kenya*, 2014, 11-12.

<sup>68</sup> Botha A, *Assessing the vulnerability of Kenyan Youths to Radicalization and Extremism*, Johannesburg: Institute for Security Studies, 2013, 243.

legitimacy than the national government does in a particular area. Therefore, they are in a better position to recognize and make stronger local practices of community-police partnerships and other positive initiatives which eventually will have the effect of improving community safety and security. Furthermore, counties are less rigid and innovative in addressing security and conflict issues.<sup>69</sup> Community policing is already currently in place, however, this function needs to be heightened. The County Police Authority is the organ that has the mandate of ensuring that public participation is enhanced through community policing activities.<sup>70</sup> It somehow leads to devolution of the security functions because the national and county government work together – even if one is not charged with the duty of enacting laws, they are both charged with the duty of implementation.

Devolution of security functions may also have the effect of improving the relationship between the police and the community. The public and the Government – through the county representatives - need to co-operate because criminals are part of the societies we live in and are known to the public, which should uncover them. Since devolution was intended to strengthen citizen participation in governance<sup>71</sup>, having security decentralized may help mend these relations.<sup>72</sup>

Political influence and the lack of commitment from political leaders have led to the lack of commitment to peace and security as there remain impediments to peace which are often stronger than the incentives. Devolution of functions and resources has improved the amount of economic and political power. Due to this, the elected leaders will often want to ensure the victory of their own communities during conflict due to the political and financial gains that can be obtained.<sup>73</sup> In as much as this may initially seem to be an advantage, this may eventually have the effect of creating gangs and militias working under these political leaders, thus, worsening the security situation. Therefore, this would only seem to be an advantage to a certain extent.

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<sup>69</sup> Brogden, M, *Commentary: community policing: a panacea from the West. African Affairs*, 2004, 635-639.

<sup>70</sup> National Police Service Act, No.11A of 2011, Section 41.

<sup>71</sup> Articles 174 and 175 of the Constitution of Kenya (2010).

<sup>72</sup> USIU/KSG. *Crime Prevention Report Phase 2*. Nairobi: USIU/KSG, 2013.

<sup>73</sup> Pastoralist Parliamentary Group, *Draft Discussion Brief: Towards Peace and Security in Dryland Kenya: the Demand for a New Approach*, 2014, 4.

### 3.4 DEFICIENCIES OF DEVOLUTION

Devolution may lead to inter-regional inequalities and therefore, widen intra-national poverty gaps and foster politically weakening forces. Since different regions are differently capable in various terms, such as, natural resources, level of economic activities, land values, etc. some areas may be able to generate more revenue than others and afford their citizens more or better quality services than is provided in other jurisdictions which lack the capacity. One of the main arguments advancing the centralization argument is the need for equitable distribution of available resources so as to avoid such inequalities. According to Mutakha Kangu, county governments have a role in the delivery of social justice which is the primary objective of devolution and is a measure to address systematic ethno-regional discrimination and inequality.<sup>74</sup> Therefore, if other counties have a better ability to provide machinery to protect themselves as compared to others, there will be issues as to discrimination and marginalization.

Decentralization can bring higher risks related to power as influence is given to local elites or special interest groups. If there are no precautions or laws in place, there may be the risk of having these groups of people taking for themselves resources initially conferred on the local people for their own benefit. It is therefore important that in formulating the policies guiding decentralization, the provisions should include measures to prevent the process from being “high-jacked” by any single group. An argument put forth by most people is that the Governors of the counties are rooting for devolution so as to have more power in their hands.<sup>75</sup> This is within the Kenyan situation.

To further the argument above, misuse of power could be encouraged by the lack of supervision or due to weak accountability mechanisms. This can happen if the central government supervision is done away with due to the new independent status of local governments, if devolution is introduced, but mechanisms for accountability are not put in place. Accountability measures should be put in place if greater autonomy is to be conferred on local governments. This could be in the form of legislation which ensures transparency and openness

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<sup>74</sup> Sheila Masinde in Kenya National Commission on Human Rights, *Nguzo za Haki*, April 2012, Issue 11  
*The Devolution Issue 1*; Article 174 of the Constitution of Kenya, 2010; The Equal Rights Trust & Kenya National Human Rights Commission, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 258.

<sup>75</sup> Miller K.L, *Advantages & Disadvantages of Local Government Decentralization*, 2002, 12-13.

in the conduct of local affairs, and new mechanisms for accountability, such as the authorization of civil society entities.<sup>76</sup>

Issues of financial resources and the cost-effectiveness of devolution are also regarded as challenges. Economists have argued that centralization of powers are responsible for what is termed as economies of scale. This argument states that central delivery of most services is usually more effective, particularly in jurisdictions that are considered small states, because of likely savings arising from reduced overheads, bulk purchasing, and other areas of cost savings. To the extent that this argument is valid, it would show the disadvantage of decentralization of functions and resources.<sup>77</sup> Therefore, it may seem that it would be more advantageous to have the central government purchase security apparatus and machinery than to entrust this function to the lower levels of government.

### **3.5 LEGAL IMPLICATIONS OF DEVOLUTION OF SECURITY FUNCTIONS**

As stated earlier, the Constitution expressly states that all security functions are an exclusive function of the national government. This mandate is placed under the Inspector General of Police. The security services include: the national defence and the use of national defence services, police services, including the setting of standards of recruitment, training of police and use of police services, criminal law and correctional services. This is provided for under the Fourth Schedule.

Therefore, in light of the constitutional provisions, what are the legal implications if devolution is to be encouraged?

First, the law would have to be introduced to the legislature to be amended so as to include the change. It would go through a legislative process, including the following steps: First Reading; Second Reading; Third Reading; Presidential Assent; then Commencement.<sup>78</sup>

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<sup>76</sup> Mills, G.E., et al, *Report on the Reform of Local Government in Jamaica*. Government Printing Office, Kingston, Jamaica 1974, 5.

<sup>77</sup> Peterson G, *Decentralization in Latin America: Learning through Experience*, the World Bank, Washington, D.C, 1997, 11.

<sup>78</sup> Kenya National Assembly, *The Legislative Process*, accessed at: <http://kenyalaw.org/kl/index.php?id=528>.

However, the Constitution,<sup>79</sup> provides that a referendum is to be carried out if an amendment relates to any of the following issues:

- (a) the supremacy of this Constitution;
- (b) the territory of Kenya;
- (c) the sovereignty of the people;
- (d) the national values and principles of governance referred to in Article 10 (2) (a) to (d);
- (e) the Bill of Rights;
- (f) the term of office of the President;
- (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;
- (h) the functions of Parliament;
- (i) the objects, principles and structure of devolved government; or
- (j) the provisions of this Chapter.

From the foregoing we could say that devolution of security functions is a matter which would require a referendum process as it relates to matters listed in Article 255. Given the logistics of a referendum, the country is not ready for such a huge milestone. Besides, there are other measures, discussed in Chapter 4 and 5, which can be taken in the meantime and still include both the national and county organs in security provision activities.

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<sup>79</sup> The Constitution of Kenya, 2010, Article 255.

## CHAPTER FOUR

### 4.0 COMPARATIVE STUDY AND ANALYSIS

Generally, due to globalisation, it may seem that there has been a trend such that countries are leaning more towards decentralisation of functions. Before globalisation, countries were generally governed by national governments and not by the regional ones introduced by the devolution regime. There has been a movement in most states such that resources, functions, powers, authority etc. have been transferred to the lower levels of government. This trend which has led to widespread decentralization has been encouraged by factors such as subnational lawfulness and respect for the rule of law – which was earlier discussed in Chapter 3. It is through devolution that transfers of powers and resources, among other things, have been effected. In addition, decentralization has been viewed as a way in which regions are able to protect their historic, linguistic, religious and/or cultural roots. This however does not negatively affect inclusiveness of all. It mostly ensure protection of those communities considered to be marginalized.<sup>80</sup>

Below, I will discuss two main countries which may be jurisdictions of best practice. I will give a brief background of what the problem was, what they did to deal with it - legal or policy wise - and an assessment of whether it has worked or not.

Then I will look at what we can borrow from the set of case studies and why and what would not be beneficial to the Kenyan situation.

#### 4.1 DIFFERING FORMS OF DEVOLUTION

##### A. Scotland

Scotland was born after the United Kingdom was devolved to Northern Ireland, Wales and itself (Scotland). The two bodies now mandated with decision making functions are the Scottish Parliament and the Scottish Government. The range of decisions made in these aforementioned bodies include those in the realm of Health; Policing; Justice; Prisons & Education. Devolution was viewed as a mechanism to ensure that needs which were specific to the Scottish people were effectively addressed. At the same time, there are reserved matters. This means that, there are various sectors that are catered for only by the UK Government and

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<sup>80</sup> Gill N & Pose A R, *The Global Trend towards Devolution and its Implications*, London School of Economics, Department of Geography and Environment, 2010, 9-10.

UK Parliament. Some of them include: Benefits and Social Security; Foreign Policy matters; Immigration; Trade and Industry; Defence and National Security etc.<sup>81</sup>

We will now look at how policing functions in Scotland are organised at the national and local levels and how this may have led to any changes in the country's policing sector.

Policing in Scotland is effected in relation to four crucial challenges, which are: Crime and Disorder; Operational Policing in the Community; The Relationship between Crime and Drugs; and Dealing with the Young People and Youth Crime.<sup>82</sup> The organisation of Scottish policing involves several bodies. Some of these institutions include: The Scottish Police College; the Scottish Criminal Record Office; Scottish Drug Enforcement Agency; and the Scottish Police Information Strategy. These aforementioned bodies mainly provide technical, training and scientific assistance to Scottish forces.<sup>83</sup> Other forces include Tayside Police, Constabulary and Central Scotland Police. They have a main responsibility of protecting those residing in various places in Scotland.<sup>84</sup>

Scotland has an organised crime strategy<sup>85</sup> which ensures that the security agencies work together to share intelligence and deal effectively with criminals.

As stated earlier, there are other functions which are only carried out by the UK Government – for example, counter terrorism activities. The reason why the policing functions are devolved to other bodies is so as to recognize benefits from the working together of members of the public, communities and professionals. The Scottish Government recognises the importance of

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<sup>81</sup> Secretary of State for Scotland, *Scotland Analysis: Devolution and the Implications of Scottish Independence*, The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office, 2013, 17-18; The Scottish Parliament, *Devolved and Reserved Matters*, Accessed at: <http://www.parliament.scot/visitandlearn/education/18642.aspx>.

<sup>82</sup> Scott K & Donnelly D, *Policing Scotland*, 2013, 13.

<sup>83</sup> Scott K, *Policing Scotland*, 15.

<sup>84</sup> Scott K, *Policing Scotland*, 15 – 16.

<sup>85</sup> To provide a strategic focus for tackling serious organised crime and to ensure coordinated and targeted action, the Scottish Government established the Serious Organised Crime Taskforce. This Taskforce brings together all the major Scottish and UK agencies directly involved in tackling serious organised crime - the Crown Office and Procurator Fiscal Service (COPFS), the Association of Chief Police Officers in Scotland (ACPOS), the Scottish Crime and Drug Enforcement Agency (SCDEA), the Serious Organised Crime Agency (SOCA), Her Majesty's Revenue and Customs (HMRC), and the Scottish Prison Service (SPS).

the cooperation so as to promote elasticity.<sup>86</sup> This argument advances the need to have an intergovernmental system of government.

A good example of how communities and members of the public have been involved in policing in Scotland is how the police forces are now employing civilian staff. Previously, civilians would only occupy minor roles such as administrative and clerical jobs, however, there have been changes. Professionally trained civilians are now occupying key roles which would only previously be occupied by police officers.<sup>87</sup> The reason for the use of civilian staff in policing was credited to the search for 'efficiency and effectiveness' and also so that there could be 'value for money'.<sup>88</sup> This function carried out by the civilian population in Scotland could be related to the community policing initiative carried out in Kenya. The only difference being that, those involved in this activity in Scotland are skilled.

With this organisation discussed above, there has been a general decrease in crime rates over time experienced in Scotland.<sup>89</sup> Some of the statistics are presented in the table below:

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<sup>86</sup> Great Britain Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism*, 2011, 112.

<sup>87</sup> Scott K, *Policing Scotland*, 19.

<sup>88</sup> Scottish Home and Health Department Circulars Numbers 3/1984, 2/1985, 5/1986 and 11/1993 – these circulars required the Scottish Police to be accountable for all resources used as there had been a rise in police expenditure to acquire various machinery while at the same time, crime rates increased, thus, lack of 'value for money'. Therefore the civilian posts were established so that there could be less use of resources to train people to carry out these tasks. While at the same time, civilians would benefit from the services provided.

<sup>89</sup> The Scottish Government, *High Level Summary of Statistics – Crime and Justice*, March 2016 accessed at: <http://www.gov.scot/Resource/0051/00510790.pdf>.

CRIME	COMPARABLE RATES
Crime, Disorder and Danger <ul style="list-style-type: none"> <li>- Domestic Abuse</li> <li>- Racist Incidents</li> <li>- Crime Victimization</li> <li>- Fire incidents</li> </ul>	The risk dropped from 25% in 1992 to 14.5% in 2015/16.
Violent Crimes <ul style="list-style-type: none"> <li>- Homicide</li> <li>- Crimes involving firearms.</li> </ul>	The number of crimes reported in 2006/07 were 120 which have dropped to 58 in the year 2015/16.

However, it should be noted that the statistics have been tabulated based on the crimes that have been reported to the police forces.<sup>90</sup>

## B. South Africa

In South Africa, functions are assigned through an intergovernmental system. This means that, there are three bodies which work together – these are, the local, provincial and national spheres of government. With this arrangement, the law provides that certain functions are strictly carried out by one sphere whilst other functions can be carried out by all spheres working together.<sup>91</sup>

Prior to the democratic elections held in 1994 in South Africa, the police functions, like many other functions in South Africa, were mainly carried out under the apartheid rule. This means that, it was highly authoritarian and centralised. At that point in time, this was advantageous to the body that was in power because it helped the government keep the police in check as all the bodies would report to a central organ and it would be easier to control them. However, it was actually not an effective way of providing security since due to all that control, it was

<sup>90</sup> The Scottish Government, *Justice Analytical Services, Recorded Crime in Scotland 2015-16*, accessed at: <http://www.gov.scot/Publications/2016/09/2960/>.

<sup>91</sup> Chapter 3, South African Constitution; South Africa National Treasury, *Intergovernmental Relations and the Local Government Fiscal Framework*, 1-2, 2011, accessed at: <http://www.treasury.gov.za/publications/igfr/2011/lg/06.%20Fiscal%20framework%202011%20LGBER%20-%20Final%20-%209%20Sept%202011.pdf>.

reported that crime prevention activities were never carried out in areas which were considered populated by black people.<sup>92</sup>

In South Africa, all law enforcement bodies charged with the task of maintaining the security and safety of the citizens are under the Department of Police. This body is responsible for ensuring that policies relating to security tasks are made, it gives direction to the law enforcement bodies and ensures that there is execution of functions as provided for by the law. This Department of Police is headed by the National Police Commissioner who is answerable to the Minister for Security.<sup>93</sup> The bodies that are under this department include: the Civilian Secretariat for Police; the Independent Police Investigative Directorate; South African Police Service (SAPS); and the Private Security Industry Regulatory Authority. SAPS is the principal body in charge of law enforcement in the country.<sup>94</sup>

Some of the main functions of SAPS as provided for under Section 205 of the South African Constitution include:

- To prevent, combat and investigate criminal offences
- To maintain law and order
- To ensure that the law is upheld and enforced
- To protect and guarantee the security of all South Africans, including their property.

In relation to the intergovernmental relations, it would be necessary to point out that the Constitution requires that the national and provincial governments work together in security matters. The law provides that before policies are put in place, there needs to be consultation between the national government and the respective provincial governments.<sup>95</sup> Besides the policy making role that provincial governments had, they were also tasked with the following duties<sup>96</sup>, among others:

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<sup>92</sup> South African Government, *Safety and Security White Paper*, accessed at: <http://www.gov.za/documents/safety-and-security-white-paper>. 74% of the country's police stations were situated in white suburbs or business districts

<sup>93</sup> Government of South Africa, *Police, Defence and Intelligence*, 2014/15, accessed at: <http://www.gov.za/about-SA/safety-security-defence>.

<sup>94</sup> Government of South Africa, *Police, Defence and Intelligence*, 2014/15.

<sup>95</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, Section 206.

<sup>96</sup> Act 108 of 1996: Section 206 and Schedules 4 and 5.

- To monitor the conduct of the police in the provinces
- To oversee and report the effectiveness and efficiency of the SAPS in the respective provinces
- To ensure and promote a good relationship between the police and the community
- To pass laws relating to various policing functions.

The inclusion of other arms of the government other than the national sphere only was due to the government's agenda to mobilise the community as a whole to participate in the nation's security and safety matters. The government decentralised powers as it saw the need to respect regional diversity and accommodate all diverse interests.<sup>97</sup> The South African government has established civilian bodies which are in charge of oversight. Kenya also has a body which carries out the same function. This is the Independent Policing Oversight Authority (IPOA). Besides that, there are channels which have been established to ensure community participation – for example, there are public provincial hearings; during the policy making process, there are consultation exercises carried out in the different provinces; the various hearings are also publicly conducted etc.<sup>98</sup> It is important to note however, that as much powers and functions are decentralised, the provinces still have difficulties in trying to access financial resources which would help them carry out these functions which have been assigned to them; which eventually makes it difficult for them to effectively carry out their tasks. This is a major challenge facing provinces in South Africa.<sup>99</sup>

A look at the statistics below<sup>100</sup> in some of the major crimes may help to determine whether the current structure is advantageous to policing functions.

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<sup>97</sup> Jozana X, Provincial Government in South Africa, 2000, 2.

<sup>98</sup> *Safety and Security White Paper*.

<sup>99</sup> South Africa National Treasury, *Intergovernmental Relations and the Local Government Fiscal Framework*, 27.

<sup>100</sup> Africa Check Guide, Factsheet: South Africa's 2015/16 Crime Statistics, accessed at: <https://africacheck.org/factsheets/factsheet-south-africas-201516-crime-statistics/>.

Category	2015	2016	Change
Robbery of cash in transit	119	137	+15.1%
Carjacking	12 773	14 602	+14.3%
Driving under the influence of alcohol or drugs	68 561	76 159	+11.1%
Murder	17 805	18 673	+4.9%
Attempted murder	17 537	18 127	+3.4%
Commercial crime	67 830	69 917	+3.1%
Robbery at non-residential premises	19 170	19 698	+2.8%
Robbery with aggravating circumstances	129 045	132 527	+2.7%
Robbery at residential premises	20 281	20 820	+2.7%
Common assault	161 486	164 958	+2.2%
Burglary at non-residential premises	74 358	75 008	+0.9%
Assault with the intent to inflict grievous bodily harm	182 556	182 933	+0.2%
Malicious injury to property	120 662	119 901	-0.6%
Stock-theft	24 965	24 715	-1.0%
Burglary at residential premises	253 716	250 606	-1.2%
Common robbery	54 927	54 110	-1.5%
Illegal possession of firearms and ammunition	15 116	14 772	-2.3%
Theft of motor vehicle and motorcycle	55 090	53 809	-2.3%
Drug-related crime	266 902	259 165	-2.9%
Sexual Offences	53 617	51 895	-3.2%
Shoplifting	71 327	68 786	-3.6%

Theft out of or from motor vehicle	145 358	139 386	-4.1%
Arson	5 127	4 903	-4.4%
All theft not mentioned elsewhere	360 541	340 372	-5.6%
Truck hijacking	1 279	1 184	-7.4%
Sexual offences discovered as result of police action	6 340	5 830	-8.0%
Bank robbery	17	6	-64.7%

The statistics relate to the time between March 2015 and March 2016. And it can be seen that while the rate in some crimes has decreased, others have considerably increased as well. At the same time, it is important to note that crime rates vary between one province and another depending on various factors.<sup>101</sup>

## 4.2 APPLICATION TO KENYA

To begin with, it is important to note that even with the examples above of the countries of best practice, from the statistics presented, even though there is devolution of security and policing functions, the effect has not had a substantial positive effect on the insecurity challenge.

Security is a public good which should be provided to all within a country. This is so because, financial resources used for the provision of security are publicly drawn. However, it is important to note that for the central government to be able to have a national budget directed towards security activities, the national government relies heavily on some of the resources acquired from the counties.<sup>102</sup> This means that, the state cannot work on its own because these resources are eventually acquired from each of the 47 counties. It needs a coordination mechanism.

<sup>101</sup> J Rauch, *The Role of Provincial Executives in Safety and Security in South Africa: A policy analysis*, 1998, accessed at: <http://www.csvr.org.za/index.php/publications/1472-the-role-of-provincial-executives-in-safety-and-security-in-south-africa-a-policy-analysis.html>.

<sup>102</sup> KIPPRA, *Policy Monitor – Devolving Security to Counties: Lessons’ from the Prisoners Dilemma*, 2014, 15.

At the same time, county jurisdictions cannot work on their own. Security is an issue which cuts across the county borders. This means, that, security threats emanate both internally and externally and therefore, the national security organs are the bodies that are most times well equipped to handle such matters and given the mandate to handle such issues.<sup>103</sup> Therefore, even at the county level, with the current legal provisions, county Governors are not capable of operationalizing security operations without seeking the mandate of the National Security Council which is currently chaired by the President.

These two issues clearly show the importance of having both levels of government working together.

At the moment, the National Police Service (NPS) has already been restructured so as to portray the devolved system of government as exists in other sectors. Those formerly known as provincial police officers are now deployed as Regional Police Coordinators (RPC). There has been the establishment of County Commanders and beneath them are the Officers Commanding the Police Division (OCPD), the Officers Commanding the Station (OCS) and the service men and women.<sup>104</sup>

There still exists a National Security Council (NSC), headed by the President. It is charged with two main duties. Those are: ensure that policies are implemented and also report to Parliament on the state of security in the country.<sup>105</sup>

There is also a National Security Advisory Committee (NSAC) whose main duty is to advise the NSC on security matters. Currently, all levels, including the counties have such regional bodies which report to the NSAC. Such information is what enables the NSAC make important decisions and advise the NSC.<sup>106</sup>

What was previously known as the Provincial Administration (PA) is now what is referred to as the National Government Administration Office (NGAO). It has been charged with the

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<sup>103</sup> KIPPRA, *Policy Monitor*, 15; Constitution of Kenya, 2010, Article 240.

<sup>104</sup> CHRIPS, *Securing the Counties*, 26.

<sup>105</sup> CHRIPS, *Securing the Counties*, 26

<sup>106</sup> CHRIPS, *Securing the Counties*, 26 – 27.

following functions: organization of national security policies; chairing County Security Committee's; coordination of disaster rescue missions at the county level.<sup>107</sup>

From the above therefore, it would seem that the county level of government has already been included in the policing and security functions and total devolution would be unachievable – due to other reasons highlighted below.

Before mentioning the challenges which would be encountered in having complete devolution, below are some of the issues that need to be addressed in light of the bodies that have been established by the current devolution structure. They include:

1. There has been a noticeable lack of understanding in carrying out of functions and who to report to between the Kenya Police and the Administration Police (AP) and the Regional Police Coordinators (RPC) and the County Police Commanders (CPC). There is misunderstanding as to rank as some CPC's are at the same rank as RPC's. In addition, there is lack of communication as to who the bodies are to report to.
2. The law requires that there be County Police Authority (CPA) organs in all counties which act as advisors to the County Security Committee (CSC). However, there is no framework stating how the security structures at the lower levels should exchange information and collaborate. The functions of the County Commissioner and the County Police Commander should be clearly delineated.<sup>108</sup>

Therefore, in light of the discussion above, the proposed devolved structure of the police and security sector would be an intergovernmental system – that is, the national and county levels of government should work together. Due to the sensitive nature of security, the National Security Council should continue to be headed by the President.

Immediately under the President should be the Cabinet Secretary working closely with the Inspector General of Police (IG). Therefore, all police actors across the sector should be answerable to these two state offices. Then, all other bodies should carry out their functions as required.

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<sup>107</sup> CHRIPS, *Securing the Counties*, 27.

<sup>108</sup> Joseph Ole Lenku, Keynote address, Crime and Security – Prevention in the Service of Citizens, 2014.

In terms of enacting laws, there should be more involvement of the county level of government. There should be consultation and a clear method of disseminating information between the county level of government and the national government before laws are enacted – to ensure that they are efficient and actually solve the problems of insecurity in the counties. Perhaps at this level, the national government could work with the County Security Committees (CSC) so as to get information which would assist in the making of laws. In addition to providing information on the above, this body should also be the one charged with the mandate of monitoring the conduct of the community members. This will enable the national government to be more effective in dealing with the more serious external threats. The whole structure would therefore resemble a division of labour and specialisation model. This would therefore be a legislative and administrative form of devolution – not just the administrative form. This distinction was made in Chapter 1.

Within the county level also, there should be a clear delineation of functions and a clear structure showing how the various bodies should collaborate. In addition to this, in as much as the County Police Authority is the body charged with the duty of finances in policing, in the county, there should be a financial oversight structure and other oversight bodies set up to ensure that finances and other resources are well managed by those put in charge of them.

The county security bodies already set up should also be charged with the duty of strengthening the community policing initiative which has already been set up.

As previously stated, a complete devolution of security and policing functions would lead to a “chaotic” transition. This is because:

- There are serious challenges relating to how human resources will be acquired to fill in the gaps in terms of staff members required by the various counties.<sup>109</sup> With the county government asking for more ranks to be put in place, there is still a gap in skilled and knowledgeable service men and women to fill these positions.
- Another problem is that of transfer of financial and other resources required as machinery by the various counties. The national government may fail to adequately allocate these resources to each of the counties especially due to the increase in the rate

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<sup>109</sup> Nyamwamu C O, *From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics*, the FES Conference on State of Implementation of the Constitution since 2010, 2012, 8.

of corruption. This may lead to feelings of discrimination among those counties which may be looked down upon, in terms of financial contribution.<sup>110</sup>

- There is also a lack of institutional capacity. That means, there are no bodies set up yet to deal with issues of oversight. As discussed earlier in Chapter 3, when power is put in the hands of a few elites, some may amass the resources for themselves. Therefore, there should be accountability mechanisms in place to keep all in check.<sup>111</sup>

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<sup>110</sup> Nyamwamu C O, *From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics*, 8.

<sup>111</sup> Nyamwamu C O, *From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics*, 8.

## CHAPTER FIVE

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

This study was carried out with the intention of establishing first, whether the current situation in the country will allow for complete devolution of security functions and if such an action will be the most suitable means of solving the insecurity problem in the country.

#### 5.2 FINDINGS

- Even though security and policing functions are a mandate placed under the national government, the county levels of government are still charged with duties which could considerably shape the security sector of the country if they are diligently performed.
- Complete devolution of the security and policing sector could lead to budgetary challenges. In 2014, the Office of the Controller of Budgets issued a report to the Senate which showed that counties lack the capacity to draw up budgets and even with the budgets drawn up, most of them had serious discrepancies and would therefore not be able to meet the set targets. Moreover, there is a general lack of inflow of finances into counties. Lack of finances would prevent the security organs from efficiently carrying out their mandates.
- At the moment there is lack of skilled manpower to fill in the positions which would be established by a devolved system of government in the security sector. Due to its sensitive nature, security should only be left to those with the relevant knowledge and skills.
- The legal implications of complete devolution may also be challenging. It may be difficult to harmonize the security laws of all the different counties and be impractical to have laws governing each county separately. This could eventually cause confusion in the whole sector.

### **5.3 CONCLUSION AND RECOMMENDATIONS**

The purpose of the dissertation was to investigate whether or not devolution of security functions is possible in Kenya – with consideration of other factors – and if it is a plausible means of dealing with the problem of insecurity facing the country.

Chapter 1 looked at the background of the problem where I mentioned some of the most tragic incidences of insecurity experienced in the country which eventually led to this debate. One of the examples mentioned is the post-election violence witnessed in the country in 2008. Also mentioned in this chapter are some of the proponents of the social contract theory which is considered the theoretical framework in line with the centralization of functions and resources. Also, the concept of devolution was explained and where it originated from and the custodians of security even in our country in relation to the Constitution of Kenya. Chapter 2 was more of a section which explained the historical background of the police force from the colonial era all the way to the kind of administration that is in place now.

Chapter 3 and 4 mostly addressed the sufficiency of devolving security functions. There was a look at some of the efficiencies and deficiencies of having the devolved system in the policing and security functions outweighed against each other while chapter 4 looked at two countries considered those of best practice.

Therefore, in conclusion, under the current Constitutional regime, security functions are placed under the national government. Legally, the only way this can be changed is if there is an amendment which goes through the referendum process. However, as already discussed above, complete devolution of the security sector would not be a practical solution after considering all other elements. Nevertheless, this does not mean that the county level of government is completely unable to participate in ensuring security. Chapter 4 clearly outlines the different ways the county level of government is involved and also shows measures which can be put in place to streamline the system.

Community Policing, which is already in place, should be strengthened in all counties. Local approaches to some of the local problems, for example petty thefts, should be adopted as this will also lead to more cooperation between the police and the members of the community. It is a more effective method of solving problems as the solutions are tailored to the needs of the

particular community. This will also encourage the local community to acquire resources locally to help them promote community policing

Secondly, it would be more reasonable for the government to look into the actual problems facing the police force. Having the national government being incharge of security functions and policing enables the country enjoy the advantages of economies of scale – this was explained in detail in Chapter 3. Therefore, there should be a move towards having institutions which can provide oversight functions so that vices within the force are dealt with. So instead of creating more problems which would be experienced in the transitional process, if complete devolution is to be carried out, inadequacies in the current force are what should be solved. The national arm of the government should work towards improving the police force. Currently, bodies such as the Independent Policing Oversight Authority (IPOA), the National Policing Commission (NPC), and other bodies established by the National Police Service Act (NPS) should lead investigations and highlight the undesirable matters that are facing the body so that they are addressed and dealt with.

The country lacks the capacity to devolve the security functions especially because of the current state of resources in the country. Some counties may experience marginalization if the county committee is unable to adequately offer equal security protection for all – which is very possible as some counties have more resources than others; for example, Nairobi may be more secure than Garissa County because it is able to fund itself and acquire machinery which inhabitants in Garissa may not be able to have.

Partial devolution can still ensure security for all so long as all stakeholders are actively involved and carry out their functions diligently with the aim of ensuring that it benefits all members of society.

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